charging, state law, causes of action, preempted, demurrer, mobile, regulation, unfair, tariff, wireless, cellular phone, reasonableness, customer, rounding-up, preempt, preemption, calculate, italics, minute, regulatory authority, preemptive, disclosure, Communications Act, state regulation

CORE CONCEPTS - ◆ Hide Concepts

Telecommunications Law : Federal Acts : Communications Act
See 47 U.S.C.S. § 332(c)(3)(A).

Constitutional Law : Supremacy Clause
Telecommunications Law : Federal Acts : Communications Act
47 U.S.C.S. § 332(c)(3)(A)'s preemptive force became effective in California on August 8, 1995. A complaint of unfair business practices would then improperly involve the state in regulating "the rates charged."

Constitutional Law : Supremacy Clause
Telecommunications Law : Telephony : Cellular, Mobile & Wireless Carriers
Telecommunications Law : Federal Acts : Communications Act
47 U.S.C.S. § 332(c)(3)(A) preempts state rate and entry regulation of all commercial mobile services, but permits state regulation of "other terms and conditions." These other terms and conditions include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority.

Civil Procedure : Pleading & Practice : Defenses, Objections & Demurrers
Civil Procedure : Appeals : Standards of Review
A general demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those allegations. When a demurrer is sustained without leave to amend, an appellate court determines whether there is a reasonable possibility that a cause of action can be stated: if it can be, the court will reverse; if not, the court affirms.

Civil Procedure : Pleading & Practice : Defenses, Objections & Demurrers
Constitutional Law : Supremacy Clause
A demurrer is an appropriate vehicle to secure a dismissal of a state law action based on federal law preemption.

Constitutional Law : Supremacy Clause
Federal law preemption is based on the Supremacy Clause of the federal Constitution, U.S. Const. art VI, cl. 2, and may be demonstrated by the explicit language of a federal statute, by an actual conflict between state and federal law, or by a federal law exclusively occupying the "legislative field."

Constitutional Law : Supremacy Clause
Governments & Legislation : Courts : Authority to Adjudicate
State court adjudication is a form of state regulation.

Telecommunications Law : Telephony : Cellular, Mobile & Wireless Carriers
Telecommunications Law : Federal Acts : Communications Act

A rate for a service, like cellular phone service, that is sold based on the length of time that it is used necessarily includes a method of measuring that time, as well as a price for each unit of time used; in short, the length of time for which a customer is charged is an inseparable component of the rate. This accords with the pertinent definition of "rate": the cost per unit of a commodity or service; a charge or payment calculated in relation to a particular sum or quantity.

Telecommunications Law : Telephony : Cellular, Mobile & Wireless Carriers
Telecommunications Law : Federal Acts : Communications Act
Rates do not exist in isolation. They have meaning only when one knows the services to which they are attached. In the context of cellular service, the element of time can no more be divorced from rate than a clock from its hands.

Telecommunications Law : Telephony : Cellular, Mobile & Wireless Carriers
Telecommunications Law : Federal Acts : Communications Act
The term "rates charged" in 47 U.S.C.S. § 332(c)(3)(A) may include both rate levels and rate structures for cellular providers. The states are precluded from regulating either of these.

Constitutional Law : Supremacy Clause
Telecommunications Law : Telephony : Cellular, Mobile & Wireless Carriers
Telecommunications Law : Federal Acts : Communications Act
Billing increments are a necessary component of the rates charged by cellular providers, and under 47 U.S.C.S. § 332(c)(3)(A), states do not have authority to prohibit cellular providers from charging in whole minute increments.

Constitutional Law : Supremacy Clause
Telecommunications Law : Telephony : Cellular, Mobile & Wireless Carriers
Telecommunications Law : Federal Acts : Communications Act
The FCC has interpreted the "rates charged by" language in 47 U.S.C.S. § 332(c)(3)(A) to prohibit states from prescribing, setting or fixing rates of cellular providers.

Telecommunications Law : Federal Acts : Communications Act
The "savings clause" of the Communications Act of 1934 states that nothing contained in that chapter (of which 47 U.S.C.S. § 332(c)(3)(A) is a part) shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of the chapter are in addition to such remedies. 47 U.S.C.S. § 414.

Constitutional Law : Supremacy Clause
Governments & Legislation : Legislation : Construction & Interpretation
A general "remedies" saving clause cannot be allowed to supersede a specific substantive pre-emption provision-- this would render the preemption provision meaningless.

Constitutional Law : Supremacy Clause
Telecommunications Law : Telephony : Cellular, Mobile & Wireless Carriers
Telecommunications Law : Federal Acts : Communications Act
47 U.S.C.S. § 332(c)(3)(A) specifies that no state or local government shall have any authority to regulate the rates charged by any commercial mobile service or any private mobile service.

Constitutional Law : Supremacy Clause
Telecommunications Law : Telephony : Cellular, Mobile & Wireless Carriers

Telecommunications Law : Federal Acts : Communications Act
In amending 47 U.S.C.S. § 332(c)(3)(A) in 1993, Congress noted that mobile services (i.e., cellular services), by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure and that § 332(c)(3)(A) preempts state rate regulation of all commercial mobile services.

Constitutional Law : Supremacy Clause
"Complete" preemption, rather than "ordinary" preemption of state law, is a much higher standard to satisfy.

Constitutional Law : Supremacy Clause
Telecommunications Law : Telephony : Cellular, Mobile & Wireless Carriers
Telecommunications Law : Federal Acts : Communications Act
Federal law may apply, in an ordinary preemptive way, if resolution of a plaintiff's challenges requires a court to assess the reasonableness of billing practices.

Constitutional Law : Supremacy Clause
Telecommunications Law : Telephony : Cellular, Mobile & Wireless Carriers
Telecommunications Law : Federal Acts : Communications Act
On August 8, 1995, 47 U.S.C.S. § 332(c)(3)(A) became effective in California after the FCC denied California's petition to retain regulatory authority over cellular rates.

Constitutional Law : Supremacy Clause
Telecommunications Law : Federal Acts : Communications Act
47 U.S.C.S. § 332(c)(3)(A) does not preempt a plaintiff from maintaining a state law action in state court for an alleged failure to disclose a particular rate or rate practice; § 332(c)(3)(A) only preempts a state law action challenging the reasonableness or legality of the particular rate or rate practice itself.

Constitutional Law : Supremacy Clause
Telecommunications Law : Telephony : Cellular, Mobile & Wireless Carriers
Telecommunications Law : Federal Acts : Communications Act
47 U.S.C.S. § 332(c)(3)(A) prohibits a state from regulating the entry of or the rates charged by any cellular service, but allows a state to regulate the other terms and conditions, including customer billing information and other consumer protection matters.

COUNSEL: Law Office of Franklin & Franklin, J. David Franklin, Law Office of Anthony A. Ferrigno, Anthony A. Ferrigno, Law Office of Whitmer & Law, James Whitmer for Plaintiffs and Appellants.

Law Office of Farella, Braun & Martel, Douglas R. Young, Robert C. Holtzapple, Grace K. Won, Law Office of Alston & Bird, Peter Kontio, Michael P. Kenny, for Defendants and Respondents GTE Mobilnet of California et al.

Law Office of Gibson, Dunn & Crutcher, Joel Steven Sanders, Steven S. Kimball, and Mark A. Perry for Defendant and Respondent Los Angeles Cellular Telephone Co.

Law Office of Pillsbury, Madison & Sutro, Mary B. Cranston, Kevin M. Fong, D. Kirk Jamieson, John S. Poulos for Defendants and Respondents AirTouch Cellular et al.

Law Office of Watson, Khachadourian, Re & Kraft, Kevin R. Iams, Law Office of Stokes Lawrence, P.S., Laura J. Buckland, Heather C. Francks for Defendants and Respondents AT&T

Wireless Services, Inc. et al. [**2]

Law Office of Gray, Cary, Ware & Freidenrich, William N. Kammer, Daniel T. Pascucci, Mary A. Lehman for Defendants and Respondents Cox Communications et al.

Pacific Telesis Group Legal Department, Bart Kimball for Respondent and Defendant Pacific Bell Mobile Services.

Law Office of Stevens & O'Connell, Charles J. Stevens, Stephen J. Burns, Bradley A. Benbrook for Defendant and Respondent Bakersfield Cellular Telephone Company.

Law Office of Keker & Van Nest, Steven A.Hirsch and Loretta Lynch for Defendant and Respondent Bay Area Cellular Telehone Co. et al.

JUDGES: DAVIS, J. We concur: BLEASE, Acting P.J., CALLAHAN, J.

OPINIONBY: DAVIS

OPINION: [*533] [***803] Recognizing the rapid growth of the cellular phone industry and related wireless communication methods (termed "commercial mobile radio services (CMRS)", or "commercial mobile services"), the United States Congress in 1993 amended the Communications Act of 1934. (47 U.S.C. §§ 151 et seq.; Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, § 6002, 107 Stat. 312, 387-97 (1993); see *In re Comcast Cellular Telecom. Litigation* (E.D.Pa. 1996) 949 F. Supp. 1193, 1197 (*Comcast Cellular*).) Pursuant [**3] to its stated goals of deregulating CMRS while providing a basic federal regulatory framework, Congress amended section 332 of the Communications Act to provide:

"No State or local government shall have any authority to regulate the entry of or *the rates charged* by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating *the other terms and conditions* of commercial mobile services." (47 U.S.C. § 332(c)(3)(A) (hereafter, § 332(c)(3)(A)), italics added; see *Comcast Cellular, supra,* 949 F. Supp. at p. 1197.)

The plaintiffs here have sued every major provider and owner of cellular phone services and related wireless personal communication services in California (for simplicity, we will refer to these entities and services specifically as defendants and generically as cellular providers or cellular services). Basically, plaintiffs object to having to pay for non-communication time when using these services (essentially, non-talking time, including "rounding-up" to the next full minute); they ground their objection in California's law on unfair and unlawful business [**4] practices. (Bus. & Prof. Code, § 17200 et seq.) The trial court sustained the defendants' demurrer without leave to amend and entered a judgment of dismissal, concluding that section 332(c)(3)(A) preempted these state law claims.

We conclude that plaintiffs cannot invoke state law to complain of having to pay non-communication time after August 7, 1995; this is because section 332(c)(3)(A)'s preemptive force became effective in California on August 8, 1995, and such a complaint would involve the state in regulating "the rates charged." However, plaintiffs can invoke state law to complain that such charges, before and after August 8, 1995, were not disclosed; this is because such [***804] disclosure is a "term and condition" over which the state can exercise its laws. Plaintiffs can also claim that defendants violated their pre-August 8, 1995 tariffs on file with the California Public Utilities Commission (PUC). Accordingly, we reverse the judgment of dismissal.

BACKGROUND

Before 1993, the regulation of cellular services was divided between federal and state authorities, largely along an interstate/intrastate line. (See [*534] former 47 U.S.C. § 152

1201.) The same cannot be said here--the plaintiffs' claims directly challenge the way defendants calculate the length of a cellular phone call and thus the rates which are charged for such a call. (See *ibid.*)

Nor does the "savings clause" in the Communications Act help the plaintiffs. That clause states that "nothing [contained] in this chapter [of which section 332(c)(3)(A) is a part] . . . shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (47 U.S.C. § 414.) "A general 'remedies' saving clause cannot be allowed to supersede [a] specific substantive pre-emption provision"--this would render the preemption provision meaningless. (*Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374, 385 [119 L. Ed. 2d 157, 168, 112 S. Ct. 2031].)

[*540] And despite a lot of ink spilled on the issue by the plaintiffs, the interstate/intrastate distinction is not relevant here on "the rates charged" issue. [**20] Section 332(c)(3)(A) specifies that "no State or local government shall have *any* authority to regulate . . . the rates charged by *any* commercial mobile service or *any* private mobile service . . . ." (Italics added.) In amending section 332(c)(3)(A) in 1993, Congress noted that "mobile services [i.e., cellular services] . . ., by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure" and that section 332(c)(3)(A) "preempts state rate . . . regulation of all commercial mobile services." (H.R. Rep. No. 103-111, p. 587; see also *In re Petition of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates* (1995) 11 FCC Rcd 796 [denying California's request to extend state regulatory authority over cellular rates--see § 332, subd. (c)(3)(B).)

It is true that the court in *DeCastro v. AWACS, Inc.* (D.N.J. 1996) 935 F. Supp. 541, in dealing with contentions involving billing for non-communication time and for rounding-up identical to those made in *Comcast Cellular*, stated that these contentions "challenge the fairness of a billing practice, not [**21] the rates themselves." (935 F. Supp. at p. 552.) This statement, however, holds little persuasive force here. First, it was made in passing without analysis. Second, it was made in the context of considering whether section 332(c)(3)(A) "completely" preempted--rather than "ordinarily" preempted--state law, a much higher standard to satisfy. (See *id.* at pp. 552, 555; *Sanderson, supra,* 958 F. Supp. at p. 957.) And third, and most significantly, *DeCastro* suggested that federal law may apply, in an ordinary preemptive way, if resolution of the plaintiffs' challenges required a court to assess the reasonableness of these billing practices. (See 935 F. Supp. at pp. 550-552, 555; see also *Comcast Cellular, supra,* 949 F. Supp. at p. 1200 [citing *DeCastro* in support of its analysis].)

In the end, the gravamen of plaintiffs' complaint, as they themselves allege, is that the defendants' actions have resulted [***809] "in subscribers, including plaintiffs, being *overcharged for service.*" (Italics added.) From this description, it is clear that plaintiffs challenge *the rates charged* by defendants. If the states could still regulate [**22] in the context presented by the plaintiffs here, that would undermine the 1993 amendment to section 332(c)(3)(A), and that statute would not have "dramatically revised the regulation of the wireless telecommunications industry." (*Conn. Dept. of Public Utility Cont. v. F.C.C., supra,* 78 F.3d at p. 845; see also Kennedy and Purcell, *Section 332*, 50 Federal Communications L.J. at pp. 559-562.)

We conclude that section 332(c)(3)(A) preempts the plaintiffs' claims to the extent that plaintiffs challenge the defendants' charging for non-communication [*541] time, including rounding-up, after August 7, 1995. August 7, 1995 is the pivotal date because on August 8, 1995, section 332(c)(3)(A) became effective in California after the FCC denied California's petition to retain regulatory authority over cellular rates. (47 U.S.C. § 332, subd. (c)(3)(B) ["If a State has in effect on June 1, 1993, any regulation concerning the rates for any [cellular provider] offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the [FCC] requesting that the State be authorized to continue

exercising authority over such rates. *If a* [**23] *State files such a petition [which California did], the State's existing regulation shall, notwithstanding [the section 332(c)(3)(A) preemption provision], remain in effect until the [FCC] completes all action (including any reconsideration) on such petition.* The [FCC] shall review such petition . . . [and] shall complete all action (including any reconsideration) within 12 months after such petition is filed . . . ."; italics added]; see 47 U.S.C. § 332 Historical and Statutory Notes, "Effective and Applicability Provisions" 2000 Cumulative Annual Pocket Part, p. 199, quoting section 6002(c)(2)(A) of Public Law 103-66 [section 332(c)(3)(A) [i.e., the preemption provision] "shall take effect 1 year after . . . date of enactment [date of enactment was August 10, 1993]"]; *Los Angeles Cellular Telephone Co. v. Superior Court* (1998) 65 Cal. App. 4th 1013, 1017, fn. 3; *In re Petition of California to Retain Regulatory Authority Over Intrastate Cellular Rates, supra,* 11 FCC Rcd 796 (August 8, 1995) [FCC order on reconsideration denying California's request to extend state regulatory authority over cellular rates]. [**24])

Plaintiffs note that their fifth and sixth causes of action (for discriminatory billing regarding ring time), their seventh cause of action (for overcharging for incomplete calls in violation of the defendants' PUC-filed tariffs and the Public Utilities Code), and their eighth and ninth causes of action (for "lag time" disconnection charges), allege unfair and unlawful business practices that began in January 1987. We agree with plaintiffs that these allegations, for conduct occurring before August 8, 1995, are not preempted by section 332(c)(3)(A) since that section's preemptive force was not in effect in California until that time.

The defendants have demurred solely on the ground of section 332(c)(3)(A) preemption. As we have seen, before August 8, 1995, California had certain regulatory powers over cellular rates. (See e.g., Pub. Util. Code, § 728; see also § 332, subd. (c)(3)(B); *Los Angeles Cellular Telephone Co. v. Superior Court, supra,* 65 Cal. App. 4th at pp. 1017-1018, fn. 6; *In re Petition of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates, supra,* 11 FCC Rcd 796.) Defendants [**25] maintain that allowing plaintiffs [*542] to pursue the pre-August 8, 1995 portion of their "rate case" would still result in a form of preempted state rate regulation. We disagree. Again, California *could* regulate cellular rates in certain ways before August 8, 1995. **n2**

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 In arguing that plaintiffs' claims are preempted regardless of when the conduct complained of occurred, the defendants cite *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 273 [128 L. Ed. 2d 229, 257, 114 S. Ct. 1483] for the principle that "a court should 'apply the law in effect at the time it renders its decision[.]'" *Landgraf* concerned the applicability of a particular section of the Civil Rights Act of 1991. The passage in *Landgraf* from which defendants quote states more fully: "Although we have long embraced a presumption against statutory retroactivity, for just as long we have recognized that, in many situations, a court should 'apply the law in effect at the time it renders its decision[.]'" (*Ibid.*) *Landgraf* discussed the interplay of these principles, citing to a decision as an example, and concluded, "our application of 'the law in effect' at the time of [the decision] was simply a response to the language of the statute." (*Ibid.*) The same can be said here. We have simply applied the language of the statute, section 332, subdivision (c)(3)(B).

The defendants acknowledge that plaintiffs have a federal remedy for unjust or unreasonable cellular charges, practices, classifications and regulations that occurred after August 8, 1995. (47 U.S.C. §§ 201(b), 207.)

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [**26]

[***810] That the pre-August 8, 1995 portion of the plaintiffs' "rate case" survives the defendants' demurrer is most pointedly illustrated by the plaintiffs' seventh cause of action. In that cause of action, the plaintiffs allege that the defendants billed for charges in violation of the tariffs the defendants had to file with the PUC; this cause of action, by definition,

involves conduct over which California had regulatory authority.

In fact, in *Los Angeles Cellular Telephone Co. v. Superior Court, supra,* 65 Cal. App. 4th 1013, the lead defendant in the case before us argued successfully that a limitation on liability contained in its PUC-filed tariff applied to it; the relevant tariff in *Los Angeles Cellular* was filed in 1989, the relevant events occurred in 1994, and the preemptive force of section 332(c)(3)(A) was not effective until August 1995. (65 Cal. App. 4th at pp. 1016-1017, fn. 3.) What is sauce for the goose is sauce for the gander. A similar analysis applies to the plaintiffs' fifth, sixth, eighth and ninth causes of action for conduct from January 1987 through August 7, 1995. We express no views on the merit of these pre-August 8, 1995 portions [**27] of these causes of action. We simply decide that these portions are not preempted by section 332(c)(3)(A). **n3**

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 We deny the plaintiffs' first request for judicial notice, regarding the pre-August 8, 1995 tariffs filed by certain defendants with the PUC. We have upheld against demurrer the cause of action that alleges these tariffs were violated (the seventh cause of action). Plaintiffs will now be held to their proof.

We have also denied the plaintiffs' second request for judicial notice, which encompassed many of the FCC rulings we have already discussed as well as some advertising materials of the defendants.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*543] **3. *The Plaintiffs' Challenges to the Defendants' Disclosure of the Rates Being Charged***

The plaintiffs have also alleged that defendants concealed, inadequately disclosed or misrepresented the particular charges that plaintiffs challenge: rounding-up (second cause of action); billing from "send to end" (third and fourth causes of action); ring time for complete (connected) [**28] calls only (fifth and sixth causes of action); overcharging for incomplete calls (seventh cause of action); and "lag time" disconnection (eighth and ninth causes of action). In each of these causes of action, plaintiffs have requested generically-phrased injunctive and restitution relief that can be applied to a nondisclosure claim.

As we have alluded to previously, section 332(c)(3)(A) does not preempt a plaintiff from maintaining a state law action in state court for an alleged *failure to disclose* a particular rate or rate practice; section 332(c)(3)(A) only preempts a state law action challenging the reasonableness or legality of the particular rate or rate practice itself. (See *Weinberg v. Sprint Corp.* (D.N.J. 1996) 165 F.R.D. 431, 438-439; *In re Long Distance Telecommunications Litigation* (6th Cir. 1987) 831 F.2d 627, 633-634; *DeCastro v. AWACS, Inc., supra,* 935 F. Supp. at pp. 550-551; *Comcast* [***811] *Cellular, supra,* 949 F. Supp. at pp. 1199-1201; *Sanderson, supra,* 958 F. Supp. at pp. 955-956; *Day v. AT & T Corp.* (1998) 63 Cal. App. 4th 325, 328-329, 336-340; *Tenore, supra,* 962 P.2d 104, 107, 111-115; [**29] *In re Southwestern Bell Mobile Systems, Inc., supra,* F.C.C. 99-356, P 23.) This is because section 332(c)(3)(A) prohibits a state from regulating "the entry of or the rates charged by" any cellular service, but allows a state to regulate "the other terms and conditions," including "customer billing information" and "other consumer protection matters." (See *Tenore, supra,* 962 P.2d at p. 111; see also H.R. Rep. No. 103-111, p. 588.) [**30]

Under our standard of review for a demurrer sustained without leave to amend, there is a reasonable possibility that plaintiffs can allege state law causes of action based on inadequate disclosure of non-communication time charges (nondisclosure as an unfair or unlawful business practice under Business & Professions Code section 17200 et seq.), and

sufficient remedy as part of that action (injunctive relief). (See *Comcast Cellular, supra,* 949 F. Supp. at p. 1201.) n4 Since section 332(c)(3)(A)'s preemptive power does not apply in this disclosure arena, the effective date of section 332(c)(3)(A) in California (August 8, 1995) is irrelevant to these causes of action.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 At this juncture, we express no views on the possibility of restitution as a remedy. (See *Comcast Cellular, supra,* 949 F. Supp. at p. 1201; see and compare *Day v. A. & T Corp.,* 63 Cal. App. 4th at pp. 336-340, with *Tenore v. AT&T Wireless SVCS, supra,* 962 P.2d at pp. 108-115; seealso *In re Long Distance Telecommunications Litigation, supra,* 831 F.2d at pp. 632-634.)

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - [**31] [*544]

DISPOSITION

The judgment is reversed. The plaintiffs are granted leave to amend their complaint consistent with the views expressed herein. Each side shall pay its own costs on appeal.

The petitions for rehearing by appellants Susanne Ball and Virginia Gordon; and respondents Pacific Bell Mobile Services, Los Angeles Cellular Telephone Company, AirTouch Communications Inc., AirTouch Cellular, Los Angeles SMSA Limited Partnership. and Sacramento Valley Limited Partnership are denied. *

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

* The denial of Los Angeles Cellualar Telephone Company's petition for rehearing includes the joinders by Bay Area Cellular Telephone Company, Cagal Cellular Communications Corporation, Napa Cellular Telepone Company, Salinas Cellular Telephone Company, AT&T Wireless Services, Inc., Stockton Cellular Telephone Company, Sacramento Cellular Telephone Company, Redding Cellular Partnership, fresno Cellular Telephone Company, Santa Barbara Cellular Telephone Company and Ventura Cellular Telephone Company.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

DAVIS, [**32] J.

We concur:

BLEASE, Acting P.J.

CALLAHAN, J.

Attachment "C "

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BERGEN COUNTY
DOCKET NO. BER-L-8974-99
A.D. # _____

UNION INK CO., INC., et als.,

Plaintiff,

vs.

AT&T CORP., et als.,

Defendants.

TRANSCRIPT
OF
MOTION

Place: Bergen County Justice Center
10 Main Street
Hackensack, NJ 07601

Date: June 9, 2000

B E F O R E:

HONORABLE JONATHAN N. HARRIS, J.S.C.

T R A N S C R I P T O R D E R E D BY:

WILLIAM J. PINILIS, ESQ. (Kaplan, Kilsheimer & Fox)

A P P E A R A N C E S:

WILLIAM J. PINILIS, ESQ. (Kaplan, Kilsheimer & Fox)
Attorney for Plaintiff

DOUGLAS S. EAKELEY, ESQ. (Lowenstein Sandler, P.C.)
Attorney for Defendant

Transcriber: Lisa A. Weite, AD/T #410
L.A.W. Transcriptions
219 Prospect Street
Midland Park, NJ 07432
(201) 612-8428

Tape Recorded
Recording Operator: Unidentified

I N D E X

THE COURT: This is Union Ink Co., Inc. v. AT&T Corp., Docket No. L-8974-99.

May I have the appearances of counsel?

MR. PINILIS: Yes, thank you, Your Honor. William J. Pinilis of Kaplan, Kilsheimer & Fox. And with me at counsel table is Lawrence King.

MR. KING: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. EAKELEY: Good afternoon, Your Honor. Douglas Eakeley of Lowenstein & Sandler for defendants. With me is Howard Spear, Senior Attorney with AT&T Corporation and James Grant, Senior Corporate Counsel with AT&T Wireless.

MR. GRANT: Good afternoon, Your Honor.

THE COURT: Okay. Mr. Eakeley, this is your motion to dismiss under Rule 4:6-2(e). I have read the papers. I believe I understand the issues. Is there anything you'd like to add or highlight?

MR. EAKELEY: If I may just highlight a few points, Your Honor.

As the Court knows, we're here on a motion grounded on two bases, Federal preemption and failure to state a claim. AT&T Wireless is a provider of wireless or cellular communication services. Plaintiffs

of the service that plaintiffs would receive.

The contract and quasi-contract claims charge breach of contract on the grounds that AT&T Wireless promised service of a quality higher than they actually received. Damages are sought in each count. Although they're not spelled out implicitly, they're all based on the difference between the service as represented or promised and the quality of the service actually received.

Now two significant events occurred since the filing of our motion, Your Honor. The first was the ruling by the Seventh Circuit Court of Appeals in Bastien against AT&T Wireless, holding that Section 332 of the Federal Communications Act preempted claims virtually indistinguishable from those here. Both in terms of their attack on the quality of service being functionally equivalent to an attack on rates, which is preempted by Section 332, as well as the claim that AT&T Wireless's infrastructure was inadequate which the Seventh Circuit held was an implied act on AT&T Wireless's right to enter the market.

Plaintiffs, in essence, contend here that plan customers paid too much in light of the blocked interrupt calls they experienced and, therefore, they should receive a refund. They asked the Court to engage

in a struggle to determine what the quality of the service was, the value of that service actually received, and the difference between that service and the service value and the rates. This is prohibited judicial rate setting and the cases make clear that challenges to quality of a provider's cellular phone service are preempted. And that, in essence, is what Bastien so held and there is no case to the contrary. And, indeed, the plaintiffs have not cited to any such case.

What plaintiffs have done in response to Bastien is to offer to withdraw their contract claims and concede that Bastien, quote, "articulately clarifies the previous unsettled state of the law and establishes that those claims are not viable," end quote.

Not surprisingly, we agree with the plaintiffs on that point. Their claims in contract are preempted. But where we part company is the claim that plaintiffs persist in asserting, namely that their fraud and negligent misrepresentation claims are somehow not preempted, but there is no principled basis for distinguishing being plaintiff's contract claims and their claims of misrepresentation for purposes of preemption analysis.

According to plaintiffs' logical, a contract

claim alleging that AT&T Wireless breached a promise to provide reliable service is preempted, yet a consumer fraud claim alleging that AT&T represented that it would provide reliable service, but then failed to do so is not preempted. This is precisely what the plaintiffs in Bastien argued and lost.

Resolution of the plaintiffs' remaining tort and consumer fraud claims, just like the resolution of the contract claims, would require the fact finder to determine what the appropriate level of infrastructure should have been, what the quality of service was compared to what it should have been, and what the value of the service was compared to the rates actually charged. As Bastien holds, this is an attack on quality of service and an invitation to the Court to set rates and as preempted by Section 332.

One other preemptory portion of Section 332 addresses the regulation of market entry by cellular phone service providers. The plaintiffs ask this Court, as the plaintiffs did in Bastien, to determine whether despite AT&T Wireless's compliance with FCC's infrastructure regulations, nonetheless, AT&T Wireless's digital network is insufficient or inadequate. Under Bastien, this is market entry regulation and is also preempted.

Now what's interesting about the fact that plaintiffs have withdrawn, in the face of Bastien, part of their claims is that they make no attempt to distinguish or justify how or why their fraud and negligent misrepresentation claims can and should survive notwithstanding their concession that their contract claims are no longer viable.

Instead, they try and hide behind the labels applied to their claims, contending that the Congress did not intend to preempt State law claims sounding in tort or consumer fraud, while conceding implicitly that the Congress did intend to preempt claims sounding under State law claims for contract breach. But as Bastien teaches, the labels plaintiffs place on the claims will not control. Regardless of label or what plaintiffs now contend they are planning, plaintiffs ask the Court to judge the quality of AT&T Wireless's service and decide what that service was worth. And this again, as I said, is rate regulation.

They also ask the Court to determine whether despite compliance with network infrastructure regulations, AT&T Wireless had an inadequate infrastructure. And again, this is an implied attack on market entry.

Curiously, also in this regard, plaintiffs

admit that they are challenging the adequacy of AT&T Wireless's network even while trying to say they are not, and that's found at Pages 14 and 15 of their brief where they say, and I quote, "Plaintiffs do not question defendant's infrastructure except to the extent that it relates to defendant's unconscionable commercial practices and fraudulent and deceitful conduct." That's at Pages 14 and 15 of their opposing brief.

And as the Seventh Circuit held in Bastien, any complaint that, and I quote, "touches on," end quote, service quality or infrastructure inadequacy is preempted. Indeed, plaintiffs cannot escape their own complaint which is replete with allegations that AT&T Wireless's network is insufficient or had insufficient capacity. And we laid these out in our reply brief, Judge, but I just want to cite to the Court for examples, Paragraphs 9, 11, 12, 18 and 20 of the complaint which refer to the limited number of channels, the insufficient digital network, the insufficient capacity to reliably service subscribers, and the like.

Plaintiffs also attempt to argue that Bastien is distinguishable on its facts, but again as a simple side-by-side comparison of the two complaints reveals, and as we have summarized in the chart at Pages 6 to 7 of our reply brief, the two complaints are functionally

indistinguishable. And again, there is no principled basis for distinguishing the Court for holding in Bastien as applied to that complaint with the complaint in this case.

Finally, on the merits of the preemption argument, plaintiffs attempt to cloak their complaint in the rhetoric of disclosure. There are a seeming morass of cases on the subject, I concede. However, those cases break down into two distinct categories. One category are cases where defendants are charged with having failed to disclose part of the rate structure or billing practices, but where the reasonableness of the rates, or the adequacy of the underlying service or infrastructure, are not implicated. Those are true disclosure cases.

On the other hand are the cases where service quality or infrastructure adequacy are challenged. There is no case touching service quality or infrastructure adequacy that has avoided preemption. To the contrary, even the disclosure cases cited by plaintiffs acknowledge that claims involving quality of service or adequacy of infrastructure are preempted under Section 332.

As a last attempt to save their remaining claims from preemption, plaintiffs point to the

preserving clauses in Section 332 itself and Section 414 of the Federal Communication Acts. 332 preserves from State regulation other terms and conditions. But the short answer to plaintiffs' argument, again, was reached by the Seventh Circuit in Bastien. This clause is to be narrowly construed and only, quote, "continues to allow claims that do not touch on the areas of rates or market entry," end quote. And that's Bastien, 205 F.3d at 987.

The Seventh Circuit and the U.S. Supreme Court in the Central Office Telephone case applied the same analysis to Section 414 of the Federal Communications Act, again reasoning that it must be construed narrowly in order to preserve the Federal regulatory policy that was at work in the Federal Communications Act. And as the Seventh Circuit again said, to read the savings clause, Section 414, extensively would abrogate the very Federal regulation of mobile telephone providers that the Act intended to create.

So in a nutshell, that's the preemption argument, Your Honor. We point out, also, that this is a preemption argument. Plaintiffs are free to assert their claims, if viable, in the FCC, and that brings me very good, if I might, to the motion to dismiss branch of -- to the motion to dismiss.

I just want to make three points on this one,

Your Honor. First, as its name conveys, the AT&T Digital One Rate Plan is a revolutionary rate plan. One rate for all calls, incoming or outgoing, regardless of the location within the United States. The advertisements upon which plaintiffs base their claim, read in context, do not misrepresent any facts. Granted, there may be some puffing and some expression of opinion. But if you look at the advertisements as we have set them out in the Jackler (phonetic) certification, they present fairly and accurately and plaintiffs do not contend otherwise, the facts of this rate plan. No roaming or long-distance charges, one rate at any time or any place a call is made or received.

The second point is that blocked and dropped calls are an inevitable part of wireless radio telephony that is a consequence of the technology involved with radio transmission. Cell phone users know this. And the related point to that, of course, is that while focusing or seeking to get the Court to focus only on the advertisements, plaintiffs have totally ignored the contract documents. And we believe those -- well, we submit that those contract documents are controlling here.

And what do those contract documents do? They

make no warranty about service. That is explicit. They, secondly, explicitly disclose that service is subject to blocked and dropped calls. In other words, they disclose what plaintiffs contend was omitted from the advertisements. Now we also contend that there is no duty to disclose in the advertisement. Again, a point that plaintiffs do not even respond to. But nonetheless, the contract documents themselves disclose what's alleged to have been misrepresented by failure to disclose in the ads and go beyond that and provide for remedies, not just -- an automatic credit if you redial within the certain length of time or a manual credit if you apply. And they give customers the right to cancel the contract within 30 days of start of service.

In other words, plaintiffs claiming that they received something that was virtually useless and entirely unreliable had 30 days to test that service before deciding to commit themselves to it. How could they possibly have reasonably relied on a representation or omission in an advertisement corrected in a contract which provides, as well, a 30-day trial period? For these reasons, we don't believe there are any claims that sound anywhere close to fraudulent or negligent misrepresentation or consumer fraud. And, indeed, plaintiffs don't even respond to the key points about

the contents of the contract documents or their controlling nature, the 30-day trial period or the absence of a duty to disclose.

In sum, Your Honor, plaintiffs attack the adequacy of AT&T Wireless's infrastructure and the quality of its service. Regardless of the label they apply, those remaining claims are preempted just as their contract claims. If they have a viable claim, they may present it to the FCC, but no viable claim is, in fact, stated. And for one or both of these reasons, we believe that the complaint should be dismissed.

THE COURT: I have one question. You started your advocacy by saying that since the time of the filing of the complaint, two events occurred.

MR. EAKELEY: Yes.

THE COURT: One of them is Bastien. What is the other?

MR. EAKELEY: Plaintiffs offered to withdraw their contract claims and the concession that Bastien vitiates those claims.

THE COURT: Thank you. Mr. Pinilis?

MR. PINILIS: Thank you, Your Honor.

I want to start by saying that we understand if we're challenging rates or we're challenging market entry, or we're challenging service that we're

preempted. So there's no misunderstanding. We don't challenge AT&T Wireless's right to provide lousy service. We don't challenge AT&T Wireless's right as long as the FCC approves it to charge a lot of money for lousy service. What we challenge is what they tell the public about the service they're going to provide. And what they have told the public in their advertisements, and this case is about their advertisements, is that this service, which was a revolutionary service. It was digital as opposed to analog. It was going to change everything about wireless telephones. What they told the public is this is so reliable, it's so good, it's so cost-effective, that you can make your cellular phone your only phone. In essence, what they said to the consuming public is this is just as good as wire-based telephones.

Now we don't take issue with their right to have this type of service, to charge what they charge for the service, to have dropped called, to have dead zones. That's fine. But don't tell people that what we're giving you is just as good as wire-based service when it's not. And that's why this is a consumer fraud case and a fraud case, and a negligent misrepresentation case, and it's not a challenge to the rates. We don't -- they're entitled to charge what the FCC tells them

they can charge. They're entitled to provide lousy service. But what they have to do is they have to be clear with the consuming public about what they're providing.

Now in their papers, they say, oh, that's absurd. You know, that would require us to essentially say in our advertisements, beware consumer, we're providing lousy service, and that's not at all what we're suggesting. What we're suggesting is don't tell people that what you're providing is just as good and just as reliable as wire -- and just as cost-effective, because it's not due to the problems, as wire-based service.

To the extent that the complaint talks about the lack of capacity and the problems with the service, it is to explain why the advertisements are misleading, and that's why the complaint gets into those things. And by the way, in counsel's papers, they provide a nice, little grid which purports to compare one complaint to the other complaint, but what it doesn't do is a complete job. It doesn't talk about Paragraph 19 of the complaint which goes through the specific misrepresentations that we allege suggest to consumers that this is just as good as wire-based service.

And counsel talks about reading the